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IN THE

Supreme Court of the United States

October Term. 1973
No. 73-1303

JEROME B. and RUTH B. ROSENTHAL,

Petitioners,

vs.

COMMISSIONER, INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

Petitioner respectfully requests that this Court grant a rehearing of its order dated May 13, 1974, which denied certiorari, and that the court now grant certiorari.

The Petition for certiorari previously filed herein presented these questions:

(1) Is there a constitutional right to trial by jury under the Seventh Amendment in a case brought to determine liability for taxes to the Federal Government?

(2) When there is a Constitutional or statutory right to trial by jury in tax liability cases brought in the U.S. District Court, may that right to jury trial be denied, in effect, under the Fifth Amendment Due Process Clause, to those who

cannot afford access to the District Court because they cannot afford to first pay the disputed tax, and then sue for refund?

(3) Was petitioner-taxpayer denied due process of law in a tax liability case by the Tax Court's quashing *subpoena duces tecum* served on the Commissioer, which quashing prevented the taxpayer from offering to prove that tax liability was imposed on him in an individiously discriminatory manner?

1. Is There a Constitutional Right to Trial by Jury Under the Seventh Amendment in a Case Brought to Determine Liability for Taxes to the Federal Government?

Petitioner contends that the Seventh Amendment's guarantee of a trial by jury extends to cases brought to determine liability for taxes to the Federal Government.

This Court in two very recent cases laid down a new criterion for deciding whether there exists a seventh Amendment constitutional right to a jury trial in a particular action or proceeding. This new criterion overrules the criterion used by the Ninth Circuit Court of Appeals in *Olshausen v. CIR*, 273 F.2d 23 (1959), apparently used in Petitioner's case, and relied upon by the Commissioner in his brief to the Ninth Circuit and in his reply brief to the petition for certiorari previously filed in the instant case.

In light of the two recent cases of this Court, the test of whether there is a constitutional right to a jury trial can no longer be said to be whether the action is one which was recognized as a common law cause of action in 1791. Rather, the test is, whether the nature of

the claim made is essentially legal, or is equitable. In the very recent Supreme Court case of *Pernell v. Southall Realty*, 416 U.S. ...., 42 L.W. 4595 (No. 72-6041, April 24, 1974), this Court stated:

> "In our view, [the analysis adopted by the Court of Appeals] is fundamentally at odds with the test we have formulated resolving Seventh Amendment questions. We recently had occasion to note that while 'the thrust of the amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond common law forms of action recognized at that time.' *Curtis v. Loether*, ... U.S. .... (1974). The phrase, 'suits at common law,' includes not only suits 'which the *common* law recognized among its old and settled proceeding, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies administered. . . . In a just sense, the amendment then may be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.'
>
> "Whether or not a close equivalent to Section 16-1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that amendment requires trial by jury in actions unheard of at common law, provided that the action involved rights and remedies of the sort traditionally enforced in an action at law, rather than an action at equity or admiralty. See *Curtis v. Loether, supra*, 415 U.S. at ....."

In *Curtis v. Loether, supra,* the Court stated at 94 S.Ct. 1007,

> "The Seventh Amendment provides that '[i]n suits at common law, where the value and controversy shall exceed $20, the right of trial by jury shall be preserved.' Although the thrust of the amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common law forms of action recognized at that time."

Contrary to the above-quoted pronouncements of this Court, the Ninth Circuit Court of Appeals stated the criterion it relied on to decide the jury trial issue in *Olshausen, supra,* thusly:

> "We have under consideration in the instant case a preceding provided by statute to test the validity of a penalty assessed pursuant to that statute. No such action existed at common law, and, therefore, no jury trial is required by the Seventh Amendment." *Olshausen v. CIR, supra,* at 28.

Not only was the holding of the Ninth Circuit in *Olshausen, supra,* in conflict with the Second Circuit holding in *Damsky v. Zavatt,* 289 F.2d 46 (1961) (See Petitioner's petition for certiorari pages 7-9), but the *Olshausen* holding is plainly now in conflict with the two recent Supreme Court cases, *Curtis v. Loether, supra* and *Pernell v. Southall Realty, supra.*

The issue in Petitioner Rosenthal's case is simply whether or not he owes money (taxes) to the Government. That issue is obviously, and has always been a

legal one, as distinguished from an equitable one, and under the test enunciated in *Curtis* and in *Pernell,* that issue is one to which the Seventh Amendment's guarantee of a jury trial would now apply.

Thus, the conflict between the decisions of this Court and those of the Ninth Circuit on the issue of when the Constitutional right to a jury trial applies, now calls for an exercise of this Court's discretionary review powers to settle this important Constitutional issue, and to insure that Petitioner as well as all other taxpayers obtain a fundamental procedural protection which this Court has recently proclaimed they are entitled to, namely, the right to trial by jury.

2. When There Is a Constitutional or Statutory Right to Trial by Jury in Tax Liability Cases Brought in the U.S. District Court, May That Right to Jury Trial Be Denied, in Effect, Under the Fifth Amendment Due Process Clause, to Those Who Cannot Afford Access to the District Court Because They Cannot Afford to First Pay the Disputed Tax, and Then Sue for Refund?

It is a denial of due process when a statute which purports to make available the right to trial by jury in a tax liability case to all taxpayer-litigants in effect makes that right available only to those taxpayers who can financially afford it.

Internal Revenue Code §7422(a) grants the right to sue in a U.S. District Court and thereby obtain a jury trial only to those who first pay the deficiency asserted against them by the Commissioner.

Therefore, those taxpayers who cannot afford to first pay the asserted deficiency are effectually precluded from bringing their cases into the U.S. District Court and are forced to litigate the issue of their alleged tax liability in the Tax Court, where there is no right to a jury trial.

Even if this Court agrees with the Commissioner's contention that the right to obtain a jury trial in a tax liability suit is a statutory right (IRC §7422(a)) and not a Constitutional right under the Seventh Amendment, once the opportunity for trial by jury is extended to those who can economically afford to bring their cases in the United States District Courts, the opportunity must be extended to all persons on a fair and equal basis, even though the opportunity *need not* have been extended at all under the Seventh Amendment. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

This principle also found eloquent expression in the words of Justice Black, who said:

> "In my view, . . ., the civil courts of the United States and each of the States belong to the people of this country, and that no person can be denied access to those courts, either for a trial, or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney." *Meltzer v. Buck Le Craw & Co.* (1971) 402 U.S. 936, 955-956.

Similarly, Justice Douglas has said:

> "Courts ought not to be a private preserve for the affluent." *Meltzer v. Buck Le Craw, supra,* at 961.

3. Was Petitioner-Taxpayer Denied Due Process of Law in a Tax Liability Case by the Tax Court's Quashing Subpoena Duces Tecum Served on the Commissioner, Which Quashing Prevented the Taxpayer From Offering to Prove That Tax Liability Was Imposed on Him in an Invidiously Discriminatory Manner?

It was a denial of due process of law to deprive taxpayer-petitioner of the means to show that other taxpayers, having entered into identical transactions and having had their returns actually reviewed and audited by the IRS were allowed the same interest deductions which were denied to petitioner.

The Ninth Circuit held that petitioner's subpoenas were properly quashed by the Tax Court because they were too broad and thus would unlawfully invade the privacy of other taxpayers. However, in complying with petitioner's request for the subpoenaed information, the Commissioner could have had the names (or other identifying information) of other taxpayers obliterated from the subpoenaed tax returns so that no invasion of privacy whatsoever would result. Moreover, the subpoena itself called for many items and documents, only a very few of which were tax returns of others.

The Commissioner contended and the Ninth Circuit held that the multitude of *cases* involving other taxpayers claiming similar interest deductions, refutes petitioner's claim of discrimination. However, the Commissioner in his effort to keep this information from the taxpayer-petitioner, misses the point that petitioner sought to prove by the use of the subpoenaed documents. Petitioner sought, by the subpoenaed documents, to show the instances where the IRS *allowed* similar or exact interest deductions to similarily situated taxpayers. Evi-

dence of these allowed deductions can only be found in the subpoenaed documents requested. The deductions certainly would not appear in decisions, or *cases,* since a taxpayer who was *allowed* such interest deduction would never litigate the question, and there would be no *case* instituted. Thus, the Ninth Circuit's contention that the multitude of *cases* involving other taxpayers claiming similar interest deductions refutes petitioner's claim of discrimination is erroneous because it overlooks the simple fact that in numerous instances taxpayers were *allowed* the same interest deduction, no *case* was litigated, and the discrimination can be discovered only through the documents petitioner sought to subpoena and offer into evidence.

Conclusion.

For the reasons set forth in this Petition for Rehearing, as well as those stated in the Petition for Certiorari, Rehearing and Certiorari should now be granted.

Respectfully submitted,

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Certificate of Counsel.

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

JEROME B. ROSENTHAL